> proceedings in the Circuit Courts, County Judge's Courts, County Courts and Civil Courts of Record, whether recognizable as cases at law or in equity, with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action."

Petitioner apparently assumes the position that the words "special statutory proceedings" contained in Rule A above had the effect of bringing within the scope of the Florida Rules the sale of collateral stock since such a sale was permitted by statute. To adopt the same position, the Court would have to take the words in question out of context with the remainder of the sentence in which they appear.

The Supreme Court of Florida, using the words "All special statutory proceedings" in the draft of Rule A, clearly intended the 1954 Rules of Civil Procedure to apply to all proceedings brought in the various civil courts of the State. Such proceedings are such as bond validations and eminent domain proceedings as opposed to the statutory prescribed method of selling stock without judicial sanction.

Section 685.02 of the Florida Statutes did not require judicial sanction. It provided for the non-judicial sale of collateral-securities—a remedy available in and of itself.

Rule 1.2(c) of the 1954 Florida Rules of Civil Procedure is enlightening. It is set out below:

> "(c) Special Statutory Proceedings. Unless otherwise specifically provided by statute, special statutory proceedings shall be entered in the common law docket."

This rule required that a special statutory proceeding shall be entered in the common law docket unless otherwise provided for by statute. A party invoking Florida Statute 685.02 was not required to enter his case on any court

docket. Section 685.02 was available without the necessity of a court proceeding.

Petitioner concluded in his brief that persons given notice via registered mail under Section 685.02 were deprived of due process and denied equal protection under law when compared to those receiving personal delivery.

Petitioner further concluded that the result of applying the Florida Rules of Civil Procedure to Section 685.02 would be to hold that the Florida Legislature intended to deprive persons in non-judicial proceedings of equal protection of law or of due process of law. Petitioner contends that the alternative to such a holding would be that the Florida Legislature intended the time to respond to a notice of sale to be available equally for both types of notice recipients and that the three day extension applicable under Rule 1.6(e) of the 1955 Florida Rules of Civil Procedure was applicable to statutory proceedings, such as Section 685.02 proceedings.

When considered with the remedy which would be provided should it be held that the Florida Rules of Civil Procedure were applicable to Section 685.02, such an application would be to give three days additional notice of a sale when notice was dispatched by registered mail.

Assuming, however, that the mail reached its destination one day after being posted, the recipient would have two more days to act upon a notice of sale than one receiving personal delivery of notice. Consequently, the latter, under Petitioner's contention, would be deprived of due process and equal protection.

The 1954 Florida Rules of Civil Procedure are just what the name implies. The term connotes the invoking of judicial sanctions to resolve a dispute. Such is not the case with Florida Statute 685.02. To incorporate Rule 1.6(e) of the 1954 Florida Rules of Civil Procedure into Florida Statute 685.02 would lead to a rather absurd result. Florida

Statute 685.02 would then provide for "ten days notice from posting if by registered mail, unless by registered mail in which case three days must be added." Clearly, this was not intended and the ten day period prescribed by the Legislature should be given exclusive effect.

Petitioner cites the case of *United States to the Use of Engineering and Equipment Company* v. *W. B. Wyatt*, 174 F. Supp. 260 (N.D. Fla., 1959), (hereinafter referred to as the "*Wyatt Case*") in which the Court held that Federal Rule of Civil Procedure 6(a) was applicable to the Miller Act, not that all of the Federal Rules of Civil Procedure were applicable thereto, as the Petitioner apparently concluded in his brief.

The *Wyatt Case* does not support the Petitioner's contention that in certain Federal Statutory proceedings, the Federal Rules of Civil Procedure do apply, and that by analogy the Florida Rules of Civil Procedure should apply to Section 685.02.

The pertinent provision of the Miller Act, 40 U. S. C. A. Section 270 a-b, follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment

bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

The relevant provision of Rule 6(a) of the Federal Rules of Civil Procedure is as follows:

"In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, *or by any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation . . ." [Emphasis added].

Rule 6(a) specifically states that it shall apply to certain applicable statutes, and the *Wyatt Case* merely holds that Federal Rule of Civil Procedure 6(a) applies to the Miller Act, because the Federal Courts have determined that the Miller Act is one of the applicable statutes to which Rule 6(a) applies.

Federal Rule of Civil Procedure 6(e) is identical to Rule 1.6(e) of the 1954 Florida Rules of Civil Procedure, which the Petitioner contends should be applicable to Florida Statute 685.02. These rules, unlike Federal Rule of Civil

Procedure 6(a) which was applied to the Miller Act in the *Wyatt Case*, do not specifically provide that they shall apply to any applicable statute.

In *United States for the Use of Lincoln Electric Products Co. v. Greene Electrical Service of Long Island, Inc.*, 252 F. Supp. 324 (E.D. N.Y., 1966) the Court specifically stated that the required notice was effective when mailed on the ninetieth day, and that notice did not have to be received by the general contractor by the ninetieth day.

In the case of *United States for the Use of Crowe v. Continental Casualty Co.*, 245 F. Supp. 871, at 873 (E.D. La. 1965), the Court stated that:

> "The contract analogy supports Plaintiff's position [that effective notice was given] since the 'notice by registered mail' requirement demonstrates an intent to consider the notice received by the Contractor when registered and mailed. Further support for this conclusion comes from other statutory though non-Miller Act, authorities.
>
> > 'Where service of notice by registered mail is expressly authorized by statute, service is effected when the notice is properly addressed, registered and mailed. (Citations omitted).' 66 C.J.S. Notice § 18e(1), p. 664, n. 92.
>
> The notices having been effective when registered and mailed on the 90th day, plaintiff accomplished procedural compliance with the literal provisions of the Miller Act at that moment."

Respondent submits that, rather than supporting Petitioner's contention, the above cited Miller Act cases recognize the effectiveness of notice when registered and mailed.

By analogy, application of the holdings of the Miller Act cases cited above, would result in the holding that the notice given by Respondent to Petitioner pursuant to Section 685.02 was effective when registered and mailed ten days prior to the sale of the collateral.

CONCLUSION

It is respectfully submitted that the 1954 Florida Rules of Civil Procedure were intended to apply to all suits of a civil nature and all special statutory proceedings in the courts of the State. Florida Statute 685.02 provided for a remedy without the necessity of judicial sanction. Clearly, this removed it from the purview within which the 1954 Florida Rules of Civil Procedure were intended to apply. By enacting the Florida Statute 685.02, the Legislature intended to provide a non-judicial action. This precludes the applicability of 1.6(e) of the 1954 Florida Rules of Civil Procedure to extend the period of notice specified in 685.02.

The Petitioner's contention that the *Wyatt Case* holds that the Federal Rules of Civil Procedure apply to the Miller Act is erroneous, and his contention that by analogy the Florida Rules of Civil Procedure should apply to Florida Statute 685.02 is without merit.

For the foregoing reasons it is respectfully submitted that certiorari is unwarranted in this case, and the decisions of the Federal Courts below are plainly correct.

Respectfully submitted,

ROGERS, TOWERS, BAILEY, JONES & GAY

By s/ David M. Foster

David M. Foster
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Brief of Respondent were mailed to Milton E. Grusmark and Natalie Baskin, attorneys for Petitioner, 2201 Collins Avenue, Miami Beach, Florida 33139, this 18th day of December, 1970.

s/ David M. Foster

APPENDIX A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. _____

BENJAMIN COHEN,

Petitioner,

vs.

CENTRAL NATIONAL BANK OF JACKSONVILLE,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Hugo L. Black, Circuit Justice for the Fifth Circuit:

Petitioner BENJAMIN COHEN prays that an order be entered extending the time for filing a Petition for Writ of Certiorari to and including November 25, 1970. Petition for Writ of Certiorari is presently due on November 12, 1970.

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on August 13, 1970.

This court has jurisdiction under 28 U.S.C. Section 1254 (1).

The question to be presented for review involves the length of notice by mail required when collateral securities are sold pursuant to Florida Statute 685.02 (repealed effective January 1, 1967). Petitioner contends that a three day mailing provision applicable in the Florida Rules of Civil Procedure requires that an additional three days be added to the statutory ten day notice of sale. The United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Middle District of Florida.

This extension of time is requested since counsel for Petitioner recently moved his office and did not have access to his files for several weeks. In addition counsel for Petitioner is at some distance from The United States District Court for the Middle District of Florida so that counsel has been handicapped in the preparation of this Petition.

No prejudice to Respondent will result from the granting of this requested extension.

WHEREFORE Petitioner respectfully requests an order extending the time for filing Petition For Writ of Certiorari to and including November 25, 1970.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
2201 Collins Avenue
Miami Beach, Florida

By: /s/ Natalie Baskin
Natalie Baskin

I HEREBY CERTIFY that a true copy of the foregoing Application For Extension Of Time In Which To File Petition For Writ Of Certiorari was mailed to James M. McLean, Attorney for Respondent, 1300 Florida Title Building, 108 West Forsyth Street, Jacksonville, Florida on this 10th day of November, 1970.

By: s Natalie Baskin

Natalie Baskin